

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

TRACEY E. GEORGE, ELLEN WRIGHT )  
CLAYTON, DEBORAH WEBSTER-CLAIR, )  
KENNETH T. WHALUM Jr., MERYL RICE, )  
JAN LIFF, TERESA M. HALLORAN, and )  
MARY HOWARD HAYES, )

Plaintiffs, )

v. )

Case No. 3:14-2182

WILLIAM EDWARD "BILL" HASLAM, as )  
Governor the State of Tennessee, in his )  
official capacity; et al. )

Defendants. )

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS**

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The Defendants, Governor Bill Haslam, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, Attorney General and Reporter Herbert H. Slatery III, and State Election Commission members Judy Blackburn, Donna Barrett, Greg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler and Kent Younce, all in their official capacities, submit this memorandum of law in support of their motion to dismiss Plaintiffs' complaint in its entirety and with prejudice for lack of subject-matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

## INTRODUCTION AND BACKGROUND

Plaintiffs are registered voters in Tennessee who voted in the November 4, 2014, general election. On the ballot in that general election were, among other things, the gubernatorial election and four proposed amendments to the Tennessee Constitution.

Plaintiffs purport to state a claim under 42 U.S.C. § 1983, alleging that their civil rights have been violated by the way in which the Defendants tabulated the votes cast on Amendment 1. Plaintiffs base that federal claim on their interpretation of language in Article XI, § 3, of the Tennessee Constitution that specifies the vote that is required for ratification of constitutional amendments by referendum. Plaintiffs allege that Defendants' method of counting the votes on Amendment I is inconsistent with the requirements of Article XI, § 3, and have thereby violated their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment by creating a fundamentally unfair system of voting and by diluting their votes.

Article XI, § 3, of the Tennessee Constitution currently provides two different methods for amending of the Tennessee Constitution—the legislative process and the convention process. At issue in this case is the legislative process, which permits the legislature to propose an amendment and then submit the amendment for ratification by popular referendum. Once the proposed amendment makes its way through the prescribed legislative process,

then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people at the next general election in which a Governor is to be chosen. *And if the people shall approve and ratify such*

*amendment or amendments by a majority of all the citizens of the State voting for Governor, voting in their favor, such amendment or amendments shall become a part of this Constitution.*

Tenn. Const., art. XI, § 3 (emphasis added).<sup>1</sup> Plaintiffs' focus is on the italicized sentence.

Pursuant to this process, four proposed amendments to the Tennessee Constitution were placed on the ballot in the November 4, 2014, general election. Proposed Amendment 1 appeared on the ballot as follows:

Shall Article I of the Constitution of Tennessee be amended by adding the following language as a new, appropriately designated section:

Nothing in this Constitution secures or protects a right or requires the funding of an abortion. The people retain the right through their elected state representatives and senators to enact, amend, or repeal statutes regarding abortion, including but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

The official results of the November 4, 2014, general election reflect that a total of 1,353,728 votes were cast for Governor. The official results further reflect that 729,163 votes were cast in favor of adoption of Amendment 1, while 657,192 votes were cast in favor of rejection of Amendment 1.<sup>2</sup> Accordingly, on December 8, 2014, Governor Haslam, Secretary of State Hargett and Attorney General Slatery certified that Amendment 1 had been ratified.

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<sup>1</sup> The complete text of Article XI, § 3, is reproduced in Appendix A.

<sup>2</sup> See <http://state.tn.us/sos/election/results.htm>.

Plaintiffs assert that Defendants have misconstrued Article XI, § 3, by reading it to mean “that Amendment 1 may be ratified if the total number of votes cast in favor of Amendment 1 equaled or exceeded the number of votes required to achieve a majority in the governor’s race.” Complaint at ¶ 6. The proper interpretation of Section 3, say the Plaintiffs, is that a voter must first meet the threshold requirement of having voted for governor in order to vote on Amendment 1 and have his or her vote counted. Complaint at ¶ 7 (“Defendants counted the votes on Amendment 1 without first establishing whether each “yes” voter met Section 3’s threshold of having also voted for governor.”). In other words, the Plaintiffs’ view is that casting a vote in the gubernatorial election is an absolute precondition to having one’s vote counted in favor of a proposed constitutional amendment in a referendum on the same ballot. Plaintiffs allege that Defendants’ method of tabulating the votes “flouts Article XI, Section 3’s mandate” and “severely burdens Plaintiffs’ right to vote” in violation of their substantive due process rights under the Due Process Clause of the Fourteenth Amendment to the federal constitution. Complaint at ¶¶ 6, 44.

Among other things, however, Plaintiffs’ would-be interpretation of Article XI, § 3, is contrary to the legislative intent behind that provision of the Tennessee Constitution.<sup>3</sup> It is also contrary to long-standing practice. Tennessee’s original Constitution of 1796 provided that

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<sup>3</sup>The Sixth Circuit has specifically recognized that it is well within the discretion of a district court to take judicial notice of the legislative and constitutional history of challenged legislation. *See Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010). *See also Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (proper subjects for judicial notice include “matters of public record (e.g., pleadings, orders and other papers on file in another action pending the court; records or reports of administrative bodies; or the legislative history of laws, rules or ordinances) as long as the facts noticed are not subject to reasonable dispute”).

whenever two thirds of the general assembly shall think it necessary to amend or change this constitution, they shall recommend to the electors, at the next election for members of the general assembly, to vote for or against a convention; and if it shall appear that a majority of all the citizens of the state voting for representatives, have voted for a convention, the general assembly shall, at their next session, call a convention . . . for the purpose of revising and amending or changing the constitution.

Tenn. Const. art. X, § 3, (1796). This provision was changed in 1834 to the forerunner of today's "legislative process" for amending the constitution. The 1834 change set out a procedure for the legislature to propose and agree to a constitutional amendment. Once a proposed amendment made its way through that process,

then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time, as the General Assembly shall prescribe. *And if the people shall approve and ratify such amendment or amendments, by a majority of all the citizens of the State, voting for Representatives, voting in their favor, such amendment or amendments shall become part of this Constitution.*

Tenn. Const., art. XI, § 3 (1834) (emphasis added).<sup>4</sup> This provision was amended again in 1870 to add back the process for calling a constitutional convention; however, the language establishing the legislative process remained unchanged.

On April 21, 1953, a limited constitutional convention was convened to address six provisions of the Constitution, including Article XI, § 3, relative to amendments and conventions. See 1951 Tenn. Pub. Acts, ch. 130. There was significant debate among the convention delegates as to what majority should be required for an

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<sup>4</sup> The complete text of the 1834 version of Article XI, § 3, is reproduced in [Appendix A](#).

amendment to be ratified. That debate is reflected in a Majority Report, a Minority Report, and a Substitute Minority Report of the Committee on Amending Process. The Majority Report proposed leaving the language “majority of all the citizens of the State voting for representatives” in Article XI, § 3, unchanged. The Minority Report would have changed the language to make ratification of a proposed amendment dependent on the majority vote of those voting on the proposed amendment. The Substitute Minority Report would have provided for approval and ratification of a proposed amendment by two-thirds of the total vote cast for or against a proposed amendment. *See Journal and Proceedings 1953 Constitutional Convention at 197-199* (copy attached as Exhibit 1).

In introducing the Majority Report, the Chair of the Committee on Amending Process, Delegate Gilreath, noted that

[a]n overwhelming majority of that committee felt that something more than a mere majority of those voting should be required. We discussed this question, that is by what percentage of the votes cast should the proposal be carried, we discussed hinging it on the voting in the presidential election; we discussed hinging it on the vote in the Governor’s race; we discussed hinging it and making it depend on the vote for congressional representatives, and one by one, for reasons which seems sufficient to the committee, each of these was rejected by a majority.

Exhibit 1 at 736.

Delegate Gilreath further discussed how this amending process has been applied in the past, and none of his comments reflects the notion that a voter must first vote in a representative election in order to have his or her vote for an

amendment counted. To the contrary, his comments reflect that a calculation of the number of votes cast for representatives was all that was required:

I have the information here that in 1940 an amendment to increase legislative pay was submitted and the popular vote on that was, Aye, 158,215; No, 77,614; that makes a total of 235,830. The vote on representatives in the same year was 377,111. In 1940 on the Governor's term, to increase it to four years, the vote was 171,209; that is Aye, 171,209; No, 68,506; that is a total of 239,715, and the total vote on representatives was 377,111. In 1950, on non-diversion of the gas tax, which I submit was a revenue measure and had no place in the Constitution whatsoever, the popular vote was Aye, 115, 232; No, 38,777, a total of 153,030; the total vote on representatives was 253,184.

*Id.* at 741-742.

Comments from other delegates reflect a similar understanding that the legislative amending process in Article XI, §3, does not impose any precondition or prior participation requirement, *i.e.*, participation in a representative election in order to participate in a constitutional-amendment referendum. Indeed, one delegate, C.C. Sims, explained that “when we were voting on an amendment to raise the pay of legislators, *I, favoring the amendment, advised my friends not to vote in uncontested legislative races because it would give the amendment a better chance.*”

*Id.* at 854 (emphasis added).

Perhaps most instructive are the comments of Delegate McGinniss, who in speaking against the Majority Report, specifically addressed the meaning of this part of Section 3 of Article XI:

The question is whether the present provision of Section 3 of Article XI shall be retained or whether it shall be changed; and if changed, what shall be substituted for it.

Now, let us take a look at the provision with a view to determining whether it should be changed or retained. Here is the exact language; that is, after it has been approved by two legislatures, then “it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the General Assembly shall prescribe, *and if the people shall approve and ratify such amendment or amendments by a majority vote of all the citizens of the State voting for representatives, voting in their favor*, such amendment or amendments shall become part of the Constitution.”

*That means, I take it all will agree, that this legislative proposed amendment must be submitted to the people at an election in which representatives in the General Assembly are elected, and **then in order to have it ratified it shall receive a vote equal to a majority of all the votes cast in that particular election for representatives . . . .***

The majority on this Committee seem adamant in their position *that ratification must be by a majority of all the votes cast for representatives, that is to say, must be by a vote equal to a majority of all the votes cast for representatives.*

*Id.* at 765-766 (emphases added).

As a result of multiple complaints about the difficulty and uncertainty in ascertaining the total number of votes cast in representative elections,<sup>5</sup> Delegate Tipton proposed “*that an amendment to carry, instead of receiving a majority of the votes cast for representatives, shall receive a majority of the votes cast for Governor.*” It

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<sup>5</sup> Delegate McGinnis, for example, ventured to “say it is impossible to ascertain, how many votes are cast for representatives in an election in those counties where more than one representative is elected. Gallup and all his staff couldn’t figure it out to save their lives, how many votes are cast for representatives in the county of Davidson in any election.” Exhibit 1 at 766.

would only be able to be voted upon when a Governor is elected or every four years, but it takes at least three years to get an amendment through the legislature now.” *Id.* at 893 (emphasis added). Tipton’s proposal was adopted as part of the Majority Report by a vote of 61-36. *Id.* at 231, 893. The Amended Majority Report was approved by the Committee on Amendment Process by a vote of 65-32, and on May 27, 1953, the Amended Majority Report, Resolution No. 120, was adopted by the entire Convention by a vote of 73-22. *Id.* at 234, 237. This Resolution was subsequently approved as an amendment to Article XI, § 3, of the Tennessee Constitution by a majority of the voters in a referendum election held in November 1953.

The version of Article XI, § 3, that was made part of the Constitution in 1953 is the current version of the “legislative process.” It is the version that, according to Plaintiffs, requires, as a precondition to voting for a proposed amendment, that the voter first have cast a ballot in the gubernatorial election. But the legislative history and especially the debates informing the 1953 amendment of Article XI, § 3, demonstrate that the Defendants’ interpretation and application of Art. XI, § 3, is precisely what was intended by the framers: there is no precondition to voting in the referendum on a constitutional amendment; rather, for a proposed amendment to pass it must receive votes equal to the majority of total votes cast for governor. The Defendants’ way of counting the votes on Amendment 1 is entirely consistent with the intent and understanding of the delegates to the 1953 constitutional convention

who created the current version of Article XI, § 3, and is, moreover, based on long-standing practice.

### **STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS**

A challenge to the court's subject-matter jurisdiction under Rule 12(b)(1) may be either a facial attack or a factual attack. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack "questions merely the sufficiency of the pleadings." *Id.* When reviewing a facial attack, this Court must take the allegations in the complaint to be true. *Id.* But when there is a factual attack, the Court must weigh conflicting evidence provided by the plaintiff and the defendant to determine whether subject-matter jurisdiction exists. *Id.* Thus in reviewing a factual attack, the Court may consider evidence outside the pleadings and both parties are free to supplement the record by affidavits. *Id.* See *Rogers v. Stratton Industries*, 798 F.2d 913, 916 (6th Cir. 1986).

When considering a Rule 12(b)(6) motion, a court must treat all the well-pleaded allegations of the complaint as true and construe all the allegations in the light most favorable to the nonmoving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Saylor v. Parker Seal Co.*, 975 F.2d 252, 254 (6th Cir. 1992). Legal conclusions or unwarranted factual inferences, however, need not be accepted as true. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

Furthermore, in order to state a claim upon which relief can be granted, a complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Mezibov v. Allen*, 411

F.3d 712, 716 (6th Cir. 2005); *Wittstock v. Mark A Van Sile, Inc.*, 330 F.3d 889, 902 (6th Cir. 2003). While the factual allegations in a complaint need not be detailed, they “must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief.” *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-95 (2007)).

The United States Supreme Court has recently encapsulated the appropriate standard to be applied in considering a motion to dismiss for failure to state a claim:

Two working principles underlie our decision in [*Bell Atlantic v.*] *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals, observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.”

*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-1950 (2009) (citations omitted).

## ARGUMENT

### I. PLAINTIFFS' SUBSTANTIVE-DUE-PROCESS CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION.

#### A. Plaintiffs lack standing to pursue their substantive-due-process claim.

Plaintiffs lack standing to pursue their substantive-due-process claim. Article III of the United States Constitution gives federal courts jurisdiction only over “cases and controversies,” of which the component of standing is an “essential and unchanging part.” *Hooker v. Sasser*, 893 F. Supp.764, 766 (M.D. Tenn. 1995) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Thus, a party seeking to invoke a federal court’s jurisdiction must establish the necessary standing to sue before that court may consider the merits of the party’s cause of action. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990)).

The Supreme Court has set forth the three elements that constitute “the irreducible constitutional minimum of standing:” (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the challenged conduct; and (3) it must be likely that a favorable decision will remedy the injury. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990)). And the plaintiff bears the burden of establishing all three elements of standing:

The party invoking federal jurisdiction bears the burden of establishing these elements [of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . .

*Lujan*, 504 U.S. at 561.

To establish an “injury in fact,” a plaintiff must show that he or she “has sustained or is in danger of sustaining some direct injury” as the result of the challenged official conduct and such “injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (citations omitted). In other words, the injury must be one that “affect[s] the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560.

Thus, the primary focus of a standing inquiry is on the party, not on the merits of the claim. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982); *Flast v. Cohen*, 392 U.S. 83, 99 (1968). While standing does not depend on the merits, it often runs on the nature and source of the claim asserted; a standing inquiry therefore requires a “careful judicial examination of the complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” *Valley Forge*, 454 U.S. at 484; *Flast*, 392 U.S. at 99. Furthermore, when the claimed injury involves the violation of a statute, the court must determine “whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

In addition to these constitutional requirements, federal courts have established certain prudential principles that affect standing. *Froelich v. Federal Election Com’n*, 855 F.Supp. 868, 869 (E.D. Va. 1994). One such prudential principle is that a generalized grievance challenging allegedly illegal government conduct is

not sufficient to establish standing. *United States v. Hays*, 515 U.S. 737, 743 (1995). As Chief Justice Marshall noted in the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), “[t]he province of the Court is, solely, to decide on the rights of *individuals*.” 5 U.S. at 170 (emphasis added).

In *Schlesinger v. Reservatists Committee to Stop the War*, 418 U.S. 708 (1974), the Supreme Court stated:

[S]tanding to sue may not be predicated upon an interest of the kind alleged here, which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, where actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.

418 U.S. at 220-21. A claimed injury “shared in substantially equal measure by all or a large class of citizens” does not justify the exercise of the court’s jurisdiction. *Warth*, 422 U.S. at 499. Thus, if a plaintiff’s interest is shared generally with the public as a whole, he lacks standing. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

The substantive component of the Due Process Clause (in contradistinction to the procedural component) protects an individual from “certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). A substantive-due-process claim may go forward under one of two theories: (1) the state actor’s conduct must shock the conscience, *see County of Sacramento v. Lewis*, 523 U.S. 833, 845-54 (1998); or (2) the state actor must have interfered with certain fundamental rights or with liberty or property

interests protected by the Due Process Clause, *see Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Here, Plaintiffs' substantive-due-process claim is that the Defendants have interfered with the fundamental right to vote. But that due-process claim is not one based on any alleged violation of a right specific to the individual plaintiffs. Indeed, Plaintiffs' Complaint fails to allege any injury that "affect[s] the plaintiff[s] in a personal and individual way." Plaintiffs' substantive-due-process claim is nothing more than a generalized grievance regarding what Plaintiffs perceive to be an illegal and unfair method of tabulating the votes cast on Amendment 1. Plaintiffs allege that

- "Defendants violated their rights to due process . . . by not tabulating the votes on Amendment 1 in compliance with Article XI, Section 3 of the Tennessee Constitution" (Complaint, ¶ 1);
- "Defendants' calculation method subjects Tennessee voters like Plaintiffs who complied with Article XI, Section 3's mandate to a coordinated scheme that is not contemplated by—and indeed is strictly prohibited by the text of—Tennessee's Constitution" (Complaint, ¶ 8);
- "Defendants' proposed counting method presents such a fundamentally unfair system by disregarding the plain language of the state constitution and by arbitrarily developing a different standard for approving public votes on constitutional amendments" (Complaint, ¶ 9); and
- "Defendants' actions have harmed Plaintiffs by creating a fundamentally unfair system of voting in violation of the Fourteenth Amendment's Due Process clause." (Complaint, ¶ 44).

These allegations make it clear that Plaintiffs are seeking to vindicate the alleged rights of *all voters*—not just the rights of the Plaintiffs—to have their vote on

Amendment 1 tabulated in a particular way, not just the alleged rights of the Plaintiffs.

The Supreme Court has consistently held that a plaintiff raising only such a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. *See Lujan*, 504 U.S. at 555; *Allen v. Wright*, 468 U.S. 757, 104 S. Ct. 3315, 3326 (1984); *Valley Forge*, 454 U.S. at 483. The Supreme Court reaffirmed this holding in *Lance v. Coffman*, 549 U.S. 437 (2007). In that case, four private citizens brought suit in federal district court arguing that Article V, § 44, of the Colorado Constitution, as interpreted by the Colorado Supreme Court, violated their rights under the Elections Clause of Article I, § 4, cl. 1, of the United States Constitution. 549 U.S. at 439. The Supreme Court first noted that its “refusal to serve as a forum for generalized grievances has a lengthy pedigree,” citing *Fairchild v. Hughes*, 258 U.S. 126 (1922), and its progeny. *Id.* at 440. The Court then found that the only injury the plaintiffs had alleged was that the law—specifically the Elections Clause—had not been followed and that this “injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” *Id.* at 442. Accordingly, the Court held that the plaintiffs lacked standing to bring their Elections Clause claim because they had no particularized stake in the litigation. *Id.*

Similarly, in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), the Supreme Court reinforced the importance of this constitutionally mandated standing inquiry in cases where citizens and taxpayers seek “to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.” 551 U.S. at 598. In that case, an organization opposed to government endorsement of religion and three of its members brought suit against the White House Office of Faith-Based and Community Initiatives, alleging that its use of federal money to fund conferences to promote the President’s “faith-based-initiatives” violated the Establishment Clause of the United States Constitution. The Supreme Court found that the interest of the plaintiffs as taxpayers in seeing that federal funds were spent in accordance with the Constitution was, in essence, the interest of the public at large and consequently did “not give rise to the kind of redressable ‘personal injury’ required for Article III standing.” *Id.* at 599.

The instant case parallels and is therefore controlled by *Lance* and *Hein*. The injury Plaintiffs have alleged is that Article XI, § 3, of the Tennessee Constitution (as they would construe it) has not been followed with respect to the tabulation of votes cast on Amendment 1 in the November 2014 general election. This injury is “plainly undifferentiated and ‘common to all members of the public,’” and does not give rise to the kind of redressable personal injury required for Article III standing.

In short, Plaintiffs are in reality bringing merely a generalized grievance shared in common by all the voters in Tennessee who voted on Amendment 1.<sup>6</sup> They have failed to allege any undifferentiated, individualized injury resulting from the allegedly “unfair system of voting,” that is, an injury not shared by all the voters who voted as they did in the November 2014 general election. Because Plaintiffs have not asserted such a personalized injury, they lack standing to assert a violation of substantive due process under the Fourteenth Amendment, and these claims must and should be dismissed for lack of federal jurisdiction.

**B. Plaintiffs fail to state a claim for violation of their substantive-due-process rights under the Fourteenth Amendment.**

Even if Plaintiffs can demonstrate the requisite standing, their Complaint still fails to state a claim for violation of substantive due process under the Fourteenth Amendment. The Supreme Court has held that “[u]ndeniably, the Constitution of the United States protects the rights of all qualified citizens to vote, in state as well as federal elections.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Because the “right to vote is a fundamental right, ‘preservative of all rights,’” *League of Women Voters v. Brunner*, 548 F.3d 463, 476 (6<sup>th</sup> Cir. 2008), “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds*, 377 U.S. at 562.

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<sup>6</sup> Although Plaintiffs couch their Complaint only in terms of the validity of the vote tabulation with regard to Amendment 1, logic and jurisprudential principles dictate that any decision on the constitutional requirement for tabulating votes as to Amendment 1 would also be a decision on the validity of the vote tabulation for the other three amendments that were on the November 4, 2014, ballot.

At the same time, because the federal constitution leaves the conduct of state elections to the states, “[p]rinciples of federalism limit the power of federal courts to intervene in state elections.” *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980). Consequently, “only in extraordinary circumstances will a challenge to a state [or local] election rise to the level of a constitutional deprivation.” *Warf v. Board of Elections of Green County, Ky*, 619 F.3d 553, 559 (6th Cir. 2010). For that reason, federal appellate courts, including the Sixth Circuit, “have uniformly declined to endorse action[s] under [§] 1983 with respect to garden variety election irregularities.” *Id.* at 559.

The Sixth Circuit has held that “[t]he Due Process clause is implicated, and §1983 relief is appropriate, in the *exceptional* case where a state’s voting system is fundamentally unfair.” *Brunner*, 548 F.3d at 478; *see Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978) (“[D]ue process is implicated where the entire election process including as party thereof the state’s administrative and judicial corrective process fails on its face to afford fundamental fairness.”). Such exceptional cases have been found, for example, when the complained-of conduct discriminates against a discrete group of voters, *see, e.g., United States v. Hays*, 515 U.S. 737, 744-45 (1995) (plaintiffs residing in racially gerrymandered districts could challenge redistricting as racially discriminatory); when a state significantly departs from previous state election practices, *see Roe v. Alabama*, 43 F.3d 574, 580-81 (11<sup>th</sup> Cir. 1995) (failure to exclude contested absentee ballots constituted a post-election departure from previous state practice); *Griffin*, 570 F.2d at 1079 (state court disrupted seven-year practice of voting

by absentee and shut-in ballot); when election officials refuse to hold an election though required by state law, resulting complete disenfranchisement, *see Duncan v. Poythress*, 657 F.2d 691, 693 (5th Cir. 1981) (state officials refused to hold an election for a vacant Supreme Court justice seat as required by state law), *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) (town officials refused to hold a local election as mandated by state and local rules); when the state employs “non-uniform rules, standards, and procedures that result in significant disenfranchisement and vote dilution,” *see Brunner*, 548 F.3d at 478, *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (city election officials changed voting rules without informing voters of new requirements for voting and refused to count their votes); or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results, *see United States v. Saylor*, 322 U.S. 385, 388-89 (1944) (fraudulent ballot stuffing).

No such exceptional circumstances are present here. Plaintiffs’ substantive-due-process claim rests entirely on their interpretation of Article XI, § 3, of the Tennessee Constitution, which is that only voters who voted for governor may have their votes on Amendment 1 counted to determine whether the amendment is ratified. In other words, Plaintiffs’ interpretation would condition a voter’s eligibility to vote on Amendment 1 (or any proposed constitutional amendment) upon that voter’s participation in the gubernatorial election.

Ironically, it is Plaintiffs’ interpretation that would render Article XI, § 3, unconstitutional. The kind of condition precedent that Plaintiffs’ interpretation

would create has been repeatedly invalidated on the grounds that it imposes a severe burden on voters' First and Fourteenth Amendment rights without furthering any compelling state interest.

*Ayer-Schaffner v. DiStefano*, 37 F.3d 726, 727 (1st Cir. 1994), dealt squarely with the question of “whether a state may condition the right to vote in one election on whether that right was exercised in a preceding election.” The court found that it could not “conceive of a governmental interest sufficiently strong to limit the right to vote to only a portion of the qualified electorate” and struck down the condition precedent as an unconstitutional burden on the right to vote. *Id.* at 730-31.

*Partnoy v. Shelley*, 277 F.Supp.2d 1064 (S.D. Ca. 2003), a case involving the recall election of Governor Gray Davis, addressed the constitutionality of a California election law providing that “[n]o vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled.” Plaintiffs alleged that this statute violated their rights to due process and equal protection under the Fourteenth Amendment because, if they did not vote on the recall issue, their votes on potential successors would not be counted. They further alleged that the statute violated their First Amendment rights by compelling them to speak on the recall decision and violated their right “not to vote,” which is implicitly recognized in the “Ninth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.” *Id.* at 1071.

Citing the Supreme Court’s decision in *Hill v. Stone*, 421 U.S. 289 (1975), the court noted that any “restriction on the franchise other than residence, age, and

citizenship must promote a compelling state interest in order to survive constitutional attack.” *Id.* at 1076. The court found that the statute in question substantially burdened the right of citizens to vote on a successor governor in the event of a recall by conditioning the counting of that vote on whether the voter cast a ballot on the question of recall and that the justifications for such burden “neither advance a state interest of compelling importance nor even an important regulatory interest of the State.” *Id.* at 1078. Not only did the statute unconstitutionally burden the right to vote, it also forced voters “to take a position on the question of recall, of which the failure to do so results in the cancellation of their vote of who should be their governor,” in violation of their First Amendment right of free expression. *Id.* citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . . The right to speak and right to refrain from speaking are complementary components.”); *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1, 16 (1986) (“[T]he choice to speak includes within it the choice of what not to say.”).

Most recently, the Colorado Supreme Court addressed the constitutionality of a provision in the Colorado Constitution similar to the statute at issue in *Parnoy*. The court held that the provision violated the First and Fourteenth Amendments to the United States Constitution because the “prior participation requirement” penalized those voters who, for whatever reason, do not wish to participate on the recall question without offering the State any practical or administrative gain. *In re*

*Hickenlooper*, 312 P.3d 153, 155 (Co. 2013). The court concluded that “[n]o compelling (or even rational) justification exists to nullify a voter’s entire ballot simply because he or she refrains from answering the initial recall question.” *Id.* at 159.

Plaintiffs’ interpretation of Article XI, § 3, would likewise penalize those voters who, for whatever reason, chose to abstain from selecting among the candidates for governor; it would, therefore, unconstitutionally infringe on the First Amendment rights of voters to refrain from speaking or to choose what not to say. Thus, Plaintiffs’ interpretation of Article XI, § 3, cannot stand, since it would impermissibly burden the First and Fourteenth Amendment rights of voters without any compelling or rational State justification.

Moreover, Plaintiffs’ interpretation of Article XI, § 3, must be rejected because it is contrary to the legislative history and to long-standing practice and understanding. When called upon to construe constitutional provisions, the Tennessee Supreme Court must construe them as written without reading any ambiguities into them. *State ex rel. Sonnenburg v. Gaia*, 717 S.W.2d 883, 885 (Tenn. 1986). When the words are free from ambiguity and doubt and express plainly and clearly the sense of the framers of the Constitution there is no need to resort to other means of interpretation. *Shelby County v. Hale*, 292 S.W.2d 745, 748 (1956). But if there is doubt about the meaning, the court will look first to the proceedings of the Constitutional Convention which adopted the provision in question as an aid to determining the intent of the framers. *Id.*

Even assuming that the constitutional provision at issue here were ambiguous, the proceedings of the Constitutional Convention that adopted the language makes the intent of the framers crystal clear: for a proposed amendment to pass it must get votes equal to the majority of total votes cast for governor. *See* Exhibit 1. Contrary to the Plaintiffs' position, the framers plainly did not intend to require that only voters who voted for governor may have their votes on Amendment 1 counted to determine whether the amendment is ratified.

In sum, Plaintiffs' have failed to state a claim for violation of their substantive-due-process rights, and that claim should be dismissed. In fact, because Plaintiffs' claims are solely predicated on the assertion that Defendants' method of tabulation violates the Tennessee Constitution, they present no federal claim at all, and should therefore be dismissed.

## **II. PLAINTIFFS' EQUAL-PROTECTION CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.**

### **A. Plaintiffs lack standing to pursue their equal-protection claim.**

Plaintiffs also assert that Defendants' method of tabulating the votes cast on Amendment violates their rights under the Equal Protection Clause of the Fourteenth Amendment by diluting their votes on Amendment 1. Once again, Plaintiffs lack standing to pursue this equal-protection claim.

To establish standing, Plaintiffs must demonstrate that (1) they have suffered a "concrete and particularized injury;" (2) the injury relates to conduct of the defendant; and (3) a judgment for the plaintiff would remedy the injury. *Morrison v.*

*Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 608 (6th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-561).

No individualized harm is visited by a state referendum and Plaintiffs have not alleged any individualized harm. Instead, Plaintiffs allege that Defendants' counting method violates the Equal Protection Clause "*both by diluting the votes on Amendment 1 of those voters who complied with the Tennessee Constitution engaged fully in their civic duty to vote, and exercised their right to vote for governor and by overvaluing the votes of Amendment 1 supporters who chose not to cast a vote for governor.*" Complaint at ¶ 10 (emphasis added). Plaintiffs further allege that Defendants' counting method creates two classes of voters—"Plaintiffs, along with those voters like them, who satisfied the requirements of Article XI, Section 3 of the Tennessee Constitution by voting in the gubernatorial race as well as on Amendment 1 and those who did not and merely voted on Amendment 1—to the detriment of Plaintiffs and others who complied with the Constitution." Complaint at ¶ 53 (emphasis added).

Thus, Plaintiffs at most plead "a type of institutional injury"—an allegedly improper method of counting the votes on a proposed constitutional amendment—"which necessarily damages" all voters "equally." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). This is insufficient to confer standing on the Plaintiffs.

As previously discussed, the Supreme Court has held that an alleged harm that is "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" does not warrant the exercise of the court's jurisdiction. *Warth*

*v. Seldin*, 422 U.S. at 499. All that Plaintiffs have alleged is precisely the type of generalized grievance that is, as a matter of law, insufficient to support standing. Plaintiffs' allegations of vote dilution do not identify any "concrete and particularized" injury they have suffered. Plaintiffs lack standing to pursue their equal protection claims, and those claims should be dismissed for lack of federal jurisdiction.

**B. Plaintiffs fail to state a claim for violation of their equal-protection rights under the Fourteenth Amendment.**

Even if Plaintiffs had the requisite standing, their complaint fails to state a claim for violation of the Equal Protection Clause. Plaintiffs allege that Defendants' method of counting votes violates equal protection for two reasons: (1) it results in vote dilution under the principles in *Moore v. Ogilvie*, 394 U.S. 814 (1969) and (2) it discriminates against an identifiable class of voters.

The Supreme Court has recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Thus, an equal-protection violation may occur when there is a denial or dilution of voting power because of group characteristics (for example, geographic location or property ownership) that bear no valid relation to the interest of those groups in the subject matter of the election. *Gordon v. Lance*, 403 U.S. 1, 4 (1971). That is why, in *Moore*, the Supreme Court invalidated an Illinois law requiring presidential candidates to obtain 200 petition signatures from each of at least 50 of

the state's 102 counties in order to be placed on the ballot.<sup>7</sup> 394 U.S. at 815. The Court held that this law violated the principle of one person, one vote because it gave equal political power to “sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights.” *Id.* at 818.

Plaintiffs' reliance on *Moore* to establish a claim of vote dilution is misplaced, however. *Moore* simply establishes the principle that geographic distribution requirements assigning equal political power to districts of unequal population violate equal protection. *See Angle v. Miller*, 673 F.3d 1122, 1129 (9th Cir. 2012). But Plaintiffs are not claiming that their votes count less because of any disproportionate allocation of electoral districts. Nor do they assert that they are being excluded from an election in which they are entitled to vote.

Plaintiffs only claim is that their equal protection rights are violated because, in counting the votes for Amendment 1, Defendants did not count only the votes of people who first voted in the gubernatorial election. This does not state an equal-protection claim, because it is not dependent on any allegation that the State has classified or categorized its citizens in an impermissible way. Even if Defendants' interpretation and application of Article XI, § 3, were incorrect, it “singles out no ‘discrete or insular minority’ for special treatment.” *Gordon*, 403 U.S. at 5.

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<sup>7</sup> Similarly, in *Gray v. Sanders*, 372 U.S. 368 (1963), the Supreme Court held that Georgia's county-unit system violated the Equal Protection Clause because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. *Id.* at 371-373. And in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court held that a statute limiting the right to vote in a revenue bond referendum to “property taxpayers” violated the Equal Protection Clause.

*Gordon* dealt with an equal-protection challenge to a provision of the West Virginia Constitution that barred political subdivisions of the State from incurring bond indebtedness without the approval of 60% in a referendum election. The challengers posited that the provision violated equal protection because it divided voters into two classes and gave disproportionate power to the minority. *Id.* at 2-3. Noting that the 60% requirement applied equally to all bond issues for any purpose and discerning no independently identifiable group or category that favored bonded indebtedness over other forms of financing, the Supreme Court held that the 60% requirement did not violate the Equal Protection Clause or any other provision of the Constitution. *Id.* at 7-8; *see also Angle v. Miller*, 673 F.3d at 1132 (finding that because “All Districts Rule” applied to all initiatives regardless of subject matter, not solely to initiatives thought to be favored by a targeted segment of the population, rule did not discriminate against any identifiable class in violation of Equal Protection Clause).

Similarly, Article XI, § 3, applies to all proposed constitutional amendments regardless of subject matter, not solely to proposed amendments thought to be favored by a targeted segment of the population. It does not discriminate against an identifiable class. Plaintiffs have, therefore, failed to state a claim for violation of their rights under the Equal Protection Clause, and that claim should be dismissed.

### **III. ALTERNATIVELY, ABSENTION IS WARRANTED BECAUSE STATE-LAW ISSUES PREDOMINATE.**

Should this Court nevertheless find that Plaintiffs do have the requisite standing and that their complaint states a claim for violation of a federally protected

right, then abstention and dismissal under the *Pullman* doctrine would be appropriate, since state-law issues clearly predominate Plaintiffs' claims. That doctrine, articulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), directs that when a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention is justified under principles of comity in order to avoid needless friction with state policies. Three objectives underlie this doctrine: (1) to "avoid the waste of a tentative decision" on an unsettled question of state law, where a federal court's decision could be supplanted by a later state court ruling; (2) to prevent "premature constitutional adjudication" of federal constitutional questions; and (3) to avoid needless friction between state and federal courts. *Id.* at 500-501.

The Sixth Circuit has held that "where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions." *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) quoting *Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 508, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (O'Connor, J. concurring) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236-37, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984)). The Sixth Circuit has further recognized that *Pullman* abstention has regularly been applied in Section 1983 actions. *Id.* (citations omitted).

As previously discussed, Plaintiffs' substantive-due-process and equal-protection claims rest entirely on their interpretation of Article XI, § 3, of the Tennessee Constitution. But that interpretation is far from being the settled or certain interpretation of Article XI, § 3; it is, rather, an interpretation that has never even been addressed by Tennessee courts. This makes *Pullman* abstention especially appropriate and necessary in this case where the "state constitution" is "the nub of the whole controversy" and is a "matter of great state concern." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970). Indeed, the need for a decision from the Tennessee Supreme Court is particularly acute in this case because the vote-tabulation method in Article XI, § 3, applies to all proposed constitutional amendments, including the other three proposed amendments that were on the ballot in the November 4, 2014, general election.

Usually when a district court abstains under *Pullman*, it retains jurisdiction pending an authoritative interpretation of the state law in question. In this case, however, it would serve no purpose to retain jurisdiction. No authoritative determination by the Tennessee courts could possibly leave grounds for further action by this Court; therefore, dismissal of this case is appropriate. *See Brown v. Tidwell*, 169 F.3d at 333. A decision rejecting Plaintiffs' interpretation of Article XI, § 3, would moot their federal constitutional claims, as those claims depend entirely on the acceptance of Plaintiffs' interpretation. If, on the other hand, the Tennessee Supreme Court were to hold that Defendants' tabulation method violates the Tennessee Constitution, appropriate relief would be available in that forum.

In sum, the present case is exactly the type of case in which *Pullman* abstention should be exercised and Plaintiffs' claims before this Court should be dismissed. Plaintiffs should be directed to Tennessee courts for interpretation of the Tennessee Constitution and for redress, if any.

#### **IV. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF IS MOOT.**

Under Article III of the Constitution, federal courts may only adjudicate live controversies. *Honig v. Doe*, 484 U.S. 305 (1988). Thus, the issue of mootness is a threshold jurisdictional issue, which cannot be waived or conceded by the actions or omissions of the parties. *See, Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988) (“We must first consider the threshold question of mootness in addressing this appeal, since it appears that no actual controversy still exists between the parties.”) and *Rettig v. Kent City School Dist.*, 788 F.2d 328, 330 (6th Cir.) (“Of initial concern to this court is the threshold issue of subject matter jurisdiction.”), *cert. denied*, 478 U.S. 1005, 106 S.Ct. 3297, 92 L.Ed.2d 711 (1986). The doctrine of mootness has two aspects: (1) the issues presented are no longer “live” or (2) the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (citations omitted).

To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 1213, n. 10, 39 L.Ed.2d 505 (1972); *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 (1973). *See also, WJW-TV, Inc.*, 878 F.2d 906, 910 (6th Cir. 1989) (“To satisfy the case or controversy

requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated.”). If events occur during the pendency of a litigation which render the court unable to grant the requested relief,” it becomes moot and thus falls outside the federal court’s jurisdiction. *Demis v. Sniezek*, 558 F.3d 508, 512 (6<sup>th</sup> Cir. 2009).

Plaintiffs initiated this action on November 7, 2014, seeking preliminary and permanent injunctive relief “enjoining Defendants from certifying the vote on Amendment 1 until they have complied with the Article XI, Section 3’s counting requirements.” Complaint at p. 15. At that time there was an actual controversy between the parties as the results of the November 4, 2014 General Election had not yet been determined and certified. However, since that time, Plaintiffs have made no separate request for injunctive relief, and on December 8, 2014, the Governor, Secretary of State and Attorney General certified the results of the November 4, 2014 General Election, including the results of the Amendment 1 referendum. Thus, Plaintiffs’ request for injunctive relief is moot and should be dismissed as being outside the Court’s federal jurisdiction. *Demis v. Sniezek*, 558 F.3d at 512.

## CONCLUSION

For these reasons, Defendants respectfully request that this Court dismiss Plaintiffs' complaint in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted

HERBERT H. SLATERY III  
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN  
Solicitor General

/s/ Janet M. Kleinfelter  
JANET M. KLEINFELTER  
Deputy Attorney General  
Public Interest Division  
Office of Tennessee Attorney General  
P.O. Box 20207  
Nashville, TN 37202  
(615) 741-7403  
[Janet.kleinfelter@ag.tn.gov](mailto:Janet.kleinfelter@ag.tn.gov)

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 11th day of December, 2014 a copy of the above document has been served upon the following persons by:

X  
to:

Electronic Case Filing (ECF) System

William L. Harbison  
C. Dewey Branstetter, Jr.  
Phillip F. Cramer  
Hunter C. Branstetter  
150 3<sup>rd</sup> Avenue South, Suite 1100  
Nashville, TN 37201  
[bharbison@sherrardroe.com](mailto:bharbison@sherrardroe.com)  
[dbranstetter@sherrardroe.com](mailto:dbranstetter@sherrardroe.com)  
[pcramer@sherrardroe.com](mailto:pcramer@sherrardroe.com)  
[hbranstetter@sherrardroe.com](mailto:hbranstetter@sherrardroe.com)

/s/ Janet M. Kleinfelter  
JANET M. KLEINFELTER